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In The

Supreme Court of the United States

October Term, 1997

JOHN J. WALKER, MADELINE E. WALKER,
DAVID M. WALKER and RICHARD J. WALKER,

Petitioners,

vs.

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW (RESTATED)

Whether the lower courts correctly determined that Petitioners failed, as a matter of law, to prove at least one essential element of their fraud-based counterclaims against Respondent.

STATEMENT PURSUANT TO RULE 29.6

Respondent has no parent company and has three nonwholly owned subsidiaries: Home Ownership Funding Corporation; Home Ownership Funding Corporation II; and West*Mac Associates Limited Partnership.

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STATEMENT OF THE CASE

A. Procedural Background

Respondent Federal Home Loan Mortgage Corporation ("Freddie Mac") is a government-sponsored, corporate entity created by an Act of Congress under 12 U.S.C.A. § 1451 *et seq.* (1989 and Supp. 1998). Freddie Mac functions as a financial intermediary between mortgage originators and the general capital markets, improving the availability of residential mortgage loans and thereby fostering increased mortgage credit for home buyers across the country. Freddie Mac also owns and sells residential real estate obtained by it through foreclosure or deeds-in-lieu of foreclosure. (Petitioners' Appendix ("Pet. App.") B-10; R. Dkt. 224, p. 7).[1] Petitioners (the "Walkers") are experienced and sophisticated real estate investors. (Pet. App. B-27; R. Dkt. 123, p. 1; 124; 125, p. 1). After Freddie Mac sued to collect on a promissory note, the Walkers asserted counterclaims for intentional infliction of emotional distress, fraud, negligent misrepresentation, and deceptive trade practices. The trial court granted Freddie Mac's motions for summary judgment and the United States Court of Appeals for the Fifth Circuit affirmed *per curiam* without an opinion. (Pet. App. A-1). The Walkers' Petition for Rehearing was denied. (Pet. App. A-2, 3).

B. Factual Background

On June 6, 1989, Freddie Mac acquired the Northhaven Racquet Club Apartments ("Northhaven") through a foreclosure

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1. The Record in the District Court was not numbered for appeal purposes. Accordingly, citations in this brief to the original papers filed in the District Court are cited as "R." followed by the lower court's docket number ("Dkt.") and, where applicable, by page reference within the cited document.

sale. Freddie Mac almost immediately listed the 344-unit complex for sale with a real estate broker at an asking price of $2.7 million cash. (Pet. App. B-12; R. Dkt. 224, p. 9). Approximately two weeks later, David Walker submitted a written letter announcing the Walkers' intent to "bid aggressively" for Northhaven and setting forth some of the grounds for their interest in Northhaven. (Pet. App. B-12; R. Dkt. 112, Ex. 1). Over the next several months, the Walkers made no less than three written offers to purchase Northhaven, all of which offers were rejected by Freddie Mac primarily because Freddie Mac hoped to sell Northhaven for cash and the Walkers wanted seller financing. (Pet. App. B-12; R. Dkt. 112, Exs. 2, 3, 4). Importantly, these multiple offers to purchase Northhaven were made long before any alleged misrepresentations by Freddie Mac.

Thereafter, in November 1989, a Bid Package was prepared for potential purchasers of Northhaven by auctioneer JBS & Associates. The bid package contained numerous warnings, disclaimers and disclosures regarding Northhaven, including:

> The properties are being sold on an "AS-IS, WHERE-IS, WITH ALL FAULTS" basis.
>
> THE INFORMATION CONTAINED IN THIS BROCHURE IS SUBJECT TO INSPECTION BY ALL APPROPRIATE PARTIES. ALL INFORMATION REGARDING THE PROPERTIES HAS BEEN OBTAINED BY SELLER FROM THIRD PARTIES. NO LIABILITY FOR ITS ACCURACY, ERRORS, OR OMISSIONS IS ASSUMED BY THE SELLER OR ITS AGENT.

* * *

> *Disclosure*: It should be noted by the prospective purchaser that the property was acquired by the Seller through a foreclosure process or by a deed-in-lieu of foreclosure. Therefore, the availability of historical Income and Expense information and explanations of variances in the given figures may be limited. In order to aid a prospective purchaser in his analysis of the property for sale, the Seller has made available the Income and Expense information of the property to the extent that the information was available to the Seller. The Seller makes the information available solely for the purpose of disclosing that the Seller has such information, but makes no representations, warranties, or other assertions, express or implied, with respect to the accuracy or content of such information.
>
> * * *
>
> All information contained herein is obtained from sources deemed reliable, but neither the Seller nor JBS & Associates make any representations, warranties, or assertions, express or implied, with respect to the accuracy or content of such information.

(Pet. App. B-12-14; R. Dkt. 112, Ex. 5).

The Walkers unsuccessfully attempted to obtain third party financing in order to bid at the auction of Northhaven on December 12, 1989. (R. Dkt. 112, Ex. 20, pp. 126-27, 57). When there were no bidders, the auction did not proceed. (Pet. App. B-14; R. Dkt. 112, Ex. 24, p. 17). Thereafter, the Walkers made yet another written offer to purchase Northhaven, this time for the sum of $2.6 million, with financing in the amount

of $2,340,000 from Freddie Mac, a 12-month no-payment period, and a guaranty by John and Madeleine Walker to infuse a minimum of $200,000 into rehabilitating Northhaven. (Pet. App. B-14; R. Dkt. 112, Exs. 5, 7). In presenting his parents' offer, David Walker emphasized that "it is imperative that we close [the sale] before mid-January, 1990 as the tax benefits expire. The tax benefits allow us to make this offer 44% above the earlier listed cash price." (R. Dkt. 112, Ex. 6). Moreover, the offer letter sent to Freddie Mac and signed by David Walker included the following:

> *Disclaimer*: Except for any warranties contained in the Deed, Purchaser acknowledges that Seller disclaims any warranty or representation concerning the nature and condition of the Property or any lease, lien, encumbrance, reservation, or condition with respect thereto or the compliance of the Property or its operation with applicable laws, ordinances, and regulations. PURCHASER SHALL ACCEPT THE PROPERTY "AS-IS", WITHOUT WARRANTY OR REPRESENTATION OF SELLER, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY.

(Pet. App. B-15; R. Dkt. 112, Ex. 7). The Offer Letter from the Walkers also stated:

> Purchaser further acknowledges and agrees: . . . (e) any information provided and/or to be provided by Freddie Mac and/or their respective agents and employees (as applicable) with respect to the Property was (or will be) obtained from a variety of sources, and Seller, and their respective agents and employees

> (as applicable) make no representations or warranties whatsoever as to the accuracy or completeness of such information because (i) such information is expressly not guaranteed and (ii) Purchaser has not relied and will not rely on such information in its consideration of the Property but will rely exclusively on its own investigation to determine whether to purchase the Property.

Id.

On January 17, 1990, Freddie Mac sold Northhaven to Richard Curtin, who immediately sold it to John and Madeleine Walker as part of a tax vehicle. (Pet. App. B-16; R. Dkt. 112, Ex. 9, 10). The Multi-Family Property Sales Agreement between Freddie Mac and Richard Curtin, which also contained an addendum acknowledging that John and Madeleine Walker were the actual purchasers, contained the following language:

> *No Representations.* Except as expressly set forth herein or called for in any of the instruments attached as exhibits hereto, SELLER MAKES NO WARRANTIES OR REPRESENTATIONS of any kind or character, express or implied with respect to the Property or the Personal Property, their physical condition (including but not limited to the presence of any Hazardous Material on or in the Property or Personal Property), the income to be derived therefrom, the expenses to be incurred with respect thereto, or any other matter relating to or affecting the same, and there are no oral agreements, warranties, or representations collateral to or affecting the Property or the Personal Property except as may be expressly set forth herein.

(Pet. App. B-16; R. Dkt. 112, Exs. 12, 13).

John and Madeleine Walker defaulted on payments for Northhaven beginning in July 1992. (*See* R. Dkt. 210, p. 2). By November 1992, with the Dallas Water Utilities threatening to shut down all water service to Northhaven for lack of payment, Freddie Mac initiated the lawsuit which forms the basis for the present appeal. (Pet. App. B-8; R. Dkt. 1, Ex. 1).

ARGUMENT AND AUTHORITIES: REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT COURT OF APPEALS AND A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON AN IMPORTANT MATTER.

Petitioners argue that the Fifth Circuit, by its *per curiam* decision without opinion, somehow established new federal law. Petitioners cite a 1966 case, *Jackson v. Sam Finley, Inc.*, 366 F.2d 148 (5th Cir. 1966), to support their contention that the Fifth Circuit has decreed that a buyer cannot prevail, as a matter of law and under any circumstances, on a fraud claim where the buyer signs a contractual disclaimer of its reliance. *See* Petition, pp. 13-14. Petitioners claim that these two decisions by the Fifth Circuit are in conflict with two decisions rendered by the Eighth Circuit Court of Appeals. Petitioners are incorrect. The Fifth Circuit in both this case and in *Jackson v. Sam Finley* affirmed lower court decisions that considered a variety of relevant facts. Contrary to Petitioners' suggestion, neither established new federal common law. Indeed, both applied state substantive law. Moreover, neither this case nor *Jackson v. Sam Finley* conflicts with the Eighth Circuit decisions.

In *Jackson v. Sam Finley*, the court applied Mississippi substantive law to the fraud-based claims asserted. In applying that law, the court acknowledged the various facts considered by the trial court, including the existence of disclaimers in the contractual documents. The court then determined that, under all the circumstances, the lower court's finding that there was no fraud was supported by the evidence. Likewise, the trial court in this matter considered all of the summary judgment evidence before it, which included affidavits and deposition excerpts. The trial court reviewed all the evidence and correctly concluded that the Walkers were sophisticated investors and were on sufficient notice that Freddie Mac did not warrant the accuracy of any financial representations. (*See* Pet. App. B-27). The court additionally emphasized the numerous disclaimers made by Freddie Mac. The court further noted that the Walkers failed to establish a link between the alleged misrepresentations of Freddie Mac and any damages they may have suffered. (*See* Pet. App. B-32-33). In sum, the lower court carefully examined all of the summary judgment evidence and did not rely solely on a single disclaimer by Freddie Mac. No new "federal law standard" (Petition, p. 13) was established.

In the same way, the purportedly conflicting decisions from the Eighth Circuit do not conflict at all. In both *Commercial Property Investments, Inc. v. Quality Inns International, Inc.*, 938 F.2d 870 (8th Cir. 1991) and *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169 (8th Cir. 1971), the courts conducted the same analysis that the lower court did in this case. In all matters, the courts considered all of the factual evidence presented.

There simply is no conflict between the Fifth and Eighth Circuits. Both apply state law to state law claims. Both evaluate the evidence in determining questions of intent and reliance. Neither has developed a hard-and-fast rule eliminating fraud claims when disclaimers exist.

II.

THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT PETITIONERS COULD NOT PROVE AT LEAST ONE OF THE ELEMENTS OF EACH OF THEIR FRAUD-BASED COUNTERCLAIMS.

The Petition, by its terms, seeks review only as to the Walkers' common law fraud counterclaim. The lower court correctly found and the Fifth Circuit correctly affirmed that, as a matter of law, the Walkers could not establish one or more of the necessary elements for their fraud-based claims. The elements of common law fraud are: (1) a false representation; (2) about a material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive the other party; (5) and the other party actually relies on the false representation; (6) to its injury. *Pence v. United States*, 316 U.S. 332, 338 (1942); *DeSantis v. Wackenhut*, 793 S.W. 2d 670, 688 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991). Petitioners also asserted a statutory cause of action for fraud in a real estate transaction, although that claim is not specifically mentioned in the Petition. The elements of fraud in a real estate transaction are: (1) a false representation; (2) made to a person for the purpose of inducing that person to enter into a contract; (3) which is relied on by that person; (4) in entering into that contract. Tex. Bus. & Com. Code § 27.01(a) (West 1998). Importantly, the statute is inapplicable when there is no contract for the sale of land or stock between the parties. *See Greenway Bank & Trust of Houston v. Smith*, 679 S.W. 2d 592, 596-97 (Tex. App. — Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*, 865 S.W. 2d 68, 82 (Tex. App. — Corpus Christi 1993, *writ denied*). It was

undisputed in the lower court that neither Richard nor David Walker executed a contract with Freddie Mac. (Pet. App. B-28). Consequently, their statutory fraud counterclaim was barred.

The lower court correctly held that the Walkers could not establish any intent to deceive on the part of Freddie Mac. The Bid Package, which the Walkers claim was an attempt to mislead them, included numerous disclaimers as to its accuracy. (R. Dkt. 112, Ex. 5). The repeated notices that potential purchasers (including the Walkers) could not and should not rely on the information contained therein, plainly demonstrate no intent to deceive or induce reliance. Significantly, the Bid Package did not even exist until *after* the Walkers had made several written offers to purchase Northhaven.

Moreover, in their own offer letter to purchase Northhaven, the Walkers repeatedly confirmed that the purchase of Northhaven was without warranties, guarantees, or representations of any kind from Freddie Mac. (R. Dkt. 112, Ex. 7). Indeed, John and Madeline Walker expressly denied that any representations ever were made to them by anyone connected with Freddie Mac. (*See* R. Dkt. 112, Ex. 21, p. 53). In addition, the individuals whom Richard and David Walker have claimed at various times made misrepresentations all expressly denied an intent to mislead. (R. Dkt. 112, Ex. 17, p. 92; Ex. 18, p. 77; Ex. 19, p. 148).

Just as the Walkers could not demonstrate an intent to mislead, they could not show reliance (much less justifiable reliance). In the offer that ultimately was accepted by Freddie Mac, the Walkers specifically represented that they were *not* relying on any information received from Freddie Mac at any time. (R. Dkt. 112, Ex. 7). Indeed, John and Madeline Walker demanded (and received) an inspection period, including the

right to inspect books and records, specifically for the purpose of conducting their own due diligence. (R. Dkt. 112, Ex. 7). Furthermore, the contract of sale repeated that John and Madeline Walker were acquiring Northhaven without any warranties or representations. (R. Dkt. 112, Ex. 12). Consequently, the Walkers were not entitled to rely, and specifically represented that they would not rely, on Freddie Mac.

The case of *Prudential Insurance Co. of America v. Jefferson Associates*, 896 S.W. 2d 156 (Tex. 1995), is squarely on point. There, the purchaser of a four-story office building sued Prudential for, among other things, fraud and violations of the Texas Deceptive Trade Practices — Consumer Protection Act related to the sale. *Id.* at 160. The buyer contracted for, and received, a right to inspect the building. The sales contract between the buyer and Prudential stated that the buyer was not "relying upon any representation, statement or other assertion with respect to the Property" and was instead relying upon his own "examination of the Property." *Id.* The Texas Supreme Court reviewed the facts and dismissed the buyer's claims, noting that the buyer in essence had agreed that "Prudential did not harm him and could not have done so, since he was relying entirely upon his own examination of the property." *Id.* at 164. As in this case, a buyer who obtains inspection rights and represents to a seller that he will conduct his own inspection and not rely on the seller cannot later claim he did so rely. "The sole cause of a buyer's injury in such circumstances, by his own admission, is the buyer himself." *Id.* at 161. *See also Grumman Allied Industries v. Rohr Industries, Inc.*, 748 F.2d 729 (2nd Cir. 1984) (a sophisticated party who inspects property and specifically disclaims reliance upon a representation in a contract cannot subsequently assert it was fraudulently induced to enter into the contract by the very representation disclaimed).

The record before the trial court also conclusively established that the Walkers could not have justifiably relied on the alleged fraudulent representations.

> To determine justifiability, courts inquire whether — given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud — it is extremely unlikely that there is actual reliance on the Plaintiff's part.

Haralson v. E.F. Hutton Group, Inc., 919 F. 2d 1014, 1026 (5th Cir. 1990) (citations omitted).

As the trial court recognized, the Walkers were sophisticated investors. (Pet. App. B-28). Prior to the Northhaven transaction, the Walkers had been involved in numerous commercial real estate transactions in Texas. (R. Dkt. 124, 125). The Walkers inspected and monitored the Northhaven property for months before making the offer which was ultimately accepted by Freddie Mac. (*See* R. Dkt. 112, Exs. 1, 2, 3, 4). Moreover, the Walkers obtained a 10-day inspection period in the sales contract to perform their due diligence and specifically disclaimed reliance on any representation or information supplied by Freddie Mac. (R. Dkt. 112, Exs. 12, 13). Prior to the expiration of the inspection period, the Walkers had the right to terminate the contract without any penalty. (*Id.*). Therefore, any claim for justifiable reliance must be rejected in view of the undisputed evidence that the Walkers enjoyed unfettered access to Northhaven and its books and records, possessed the business expertise to make effective use of such access, and asserted that they were relying solely on such access in making their decision to purchase Northhaven. *See Grumman Allied Industries*, 748 F. 2d at 737. Thus, the trial court correctly ruled, and the Fifth Circuit Court of Appeals correctly affirmed, that Freddie Mac

was entitled to an award of summary judgment on the Walkers' common law fraud counterclaim because the Walkers could not prove, as a matter of law, at least one of the essential elements of their claim.

CONCLUSION

For the foregoing reasons, Respondent prays that Petitioners' request for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE INVOLVED

CHAPTER 27. FRAUD

Section

27.01. Fraud in Real Estate and Stock Transactions.
27.02. Certain Insurance Claims for Excessive Charges.

§ 27.01. Fraud in Real Estate and Stock Transactions

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a

(1) false representation of a past or existing material fact, when the false representation is

(A) made to a person for the purpose of inducing that person to enter into a contract; and

(B) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

Appendix A

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.

* * *